

1 **FEDERAL ELECTION COMMISSION**  
2 **999 E Street, N.W.**  
3 **Washington, D.C. 20463**

4  
5 **FIRST GENERAL COUNSEL'S REPORT**

6  
7 MUR: 5420  
8 DATE COMPLAINT FILED: 3/1/2004  
9 DATE OF NOTIFICATION: 3/8/2004  
10 DATE ACTIVATED: 7/7/2004

11  
12 EXPIRATION OF STATUTE OF  
13 LIMITATIONS: 2/5/2009

14  
15 **COMPLAINANT:** Mark Ortiz

16  
17 **RESPONDENT:** Conz-Diaz Champion Racing (trade name of  
18 Coaches Enterprise, Inc.)

19  
20 **RELEVANT STATUTES** 2 U.S.C. § 431(17)  
21 **AND REGULATIONS:** 2 U.S.C. § 434(b)(4)(H)  
22 2 U.S.C. § 441b(a)  
23 11 C.F.R. § 100.5(e)(4)  
24 11 C.F.R. § 100.22(a)  
25 11 C.F.R. § 100.26  
26 11 C.F.R. § 109.21(a)

27  
28 **INTERNAL REPORTS CHECKED:** None

29  
30 **FEDERAL AGENCIES CHECKED:** None

31  
32 **I. INTRODUCTION**

33 In this matter, complainant alleged that Conz-Diaz Champion Racing ("CDC") was  
34 "fielding" a stock car bearing advertising for the Bush-Cheney candidacy in the National  
35 Association for Stock Car Auto Racing ("NASCAR") Busch Grand National ("BGN") racing  
36 series. According to complainant, CDC is a "business," and as such, if it offered the Bush-  
37 Cheney campaign free or discounted advertising, it would be making a prohibited in-kind  
38 contribution. See 2 U.S.C. § 441b. As discussed in more detail below, this Office recommends

25044110204

1 that the Commission exercise its prosecutorial discretion and take no action against CDC and  
2 close the file.

3 **II. FACTUAL BACKGROUND**

4 **A. NASCAR BGN**

5 The NASCAR BGN racing series, referred to by some as the "Minor Leagues," is  
6 typically a training ground for drivers hoping to compete in the future in NASCAR's Nextel Cup  
7 racing series, which offers more powerful cars, more popular drivers, longer tracks, and far larger  
8 audiences and prize money than the BGN racing series.<sup>1</sup> Dick Trickle, *A Yankee's Guide to*  
9 *NASCAR, NASCAR Racing Divisions* (last modified March 4, 2004) available at  
10 [http://www.tricklean.com/guide/div\\_.html](http://www.tricklean.com/guide/div_.html). Although the NASCAR BGN series may not be as  
11 popular or as profitable as the NASCAR Nextel Cup series, it is an expensive venture for  
12 participating team owners. Dick Trickle, *A Yankee's Guide to NASCAR, The World's Most*  
13 *Expensive Real Estate* (last modified March 4, 2004) available at  
14 <http://www.tricklean.com/guide/monawd4.html>. Because of expenses like cars, garage space,  
15 wind-tunnel testing, salaries, fuel, spare parts and tires, NASCAR BGN team owners typically  
16 have multi-million dollar operating budgets. *Id.* Consequently, these owners generally look for  
17 corporate sponsorship to underwrite the majority of such expenses. *Id.* In exchange for a  
18 primary sponsor's contribution of roughly 60-75% of a team's operating budget, the sponsor's  
19 name is usually placed on the car's hood, and it chooses the car's overall paint scheme. *Id.*

---

<sup>1</sup> Sportsbusinessdaily.com estimates in its December 10, 2003 online issue that during the 2002-2003 racing season, the NASCAR Nextel Cup attracted approximately 6,700,000 spectators, while the NASCAR BGN attracted approximately 2,400,000 spectators. Staff Report, *Turnstile Tracker: 36 Million Pit for Motorsports* (December 10, 2003), available at <http://www.sportsbusinessdaily.com/index.cfm?fuseaction=article.main&articleId=81342>. Driver Dale Earnhardt Jr., in February 2004, won both a Nextel series race and a BGN series race, receiving \$1,495,070 and \$96,210 for the Nextel and BGN races, respectively. Posting of Official Results, NASCAR.com (February 15, 2004) available at [http://www.nascar.com/races/cup/2004/1/data/results\\_official.html](http://www.nascar.com/races/cup/2004/1/data/results_official.html). See also Posting of Official Results at [http://www.nascar.com/races/bg/2004/1/data/results\\_official.html](http://www.nascar.com/races/bg/2004/1/data/results_official.html) (February 16, 2004).

25044110205

1           **B.     CDC's Racing Activities**

2           According to filings with the Michigan Department of Consumer & Industry Services, on  
3           December 2, 2003, Coaches Enterprises, Inc., a Michigan domestic profit corporation, created the  
4           assumed trade name CDC.<sup>2</sup> Three individuals reportedly co-own CDC: (1) Edward "Butch"  
5           Conz, Jr., a former stock car racing driver; (2) Mark Davidson, the president of Precision Cutter  
6           Grinding Company ("Precision Cutter"), and (3) Victor Diaz. *See* Brian Conz, *Plans for 2004*  
7           (as of February 8, 2004) *available at* <http://www.brianconz.com>. This Office believes that at the  
8           time of the events in question, Mr. Diaz also served as the sixth Vice Chair (Hispanic Chair) of  
9           the Michigan State Republican Party ("Michigan GOP").<sup>3</sup>

10           In January 2004, CDC announced that it was a new member of the NASCAR BGN series,  
11           and that Brian Conz, CDC co-owner Butch Conz's brother, would be its driver for the 2004  
12           NASCAR BGN race season. *Id.* CDC entered a stock car named the "First Lady" in the  
13           February 2004 Hershey's Kisses 300 ("Hershey's") in Daytona, Florida, the first race of the 2004  
14           NASCAR BGN season. A photograph found on the website [www.kimballphotos.com](http://www.kimballphotos.com) shows  
15           what appears to be CDC's "First Lady" car at the time of the Hershey's race. *See* Attachment 1.  
16           Specifically, on the hood of the car at issue, the name "Bush" is found directly above a split  
17           image of a bald eagle and the American flag. *Id.* Directly below the bald eagle/American flag

---

<sup>2</sup> Under Michigan state law, a corporation may transact business under an assumed name, or names other than its corporate name, by filing a certificate stating the true name of the corporation and the assumed name under which the business is to be transacted. Mich. Comp. Laws § 450.1217 (1997).

<sup>3</sup> The Michigan GOP website (<http://www.migop.org/leadership/vicechairs.asp>) notes that Mr. Diaz resides in Grand Ledge, Michigan. Although the Michigan GOP website does not address how long Mr. Diaz of Grand Ledge, Michigan has served as Vice Chair, internet sources identify him as having that position as early as December 1, 2003. *See Ingham County Republicans website, available at* <http://www.inghamcountyrepublicans.org>. Additionally, publicly available sources identify CDC co-owner Victor Diaz as a resident of Grand Ledge, Michigan. Given that phone directories for the Grand Ledge area list only one Victor Diaz as a resident, and the fact that Vice Chair Victor Diaz of the Michigan GOP has held that position from at least December 1, 2003 to the present, we believe there is a permissible inference that Victor Diaz held both positions simultaneously.

25044110206

1 image is the name "Cheney." To the left of the bald eagle/American flag image are the numbers  
2 "04." *Id.* According to Brian Conz's website:

3 Team owners, [sic] Butch Conz and Victor Diaz are prominent  
4 Republicans and have taken it upon themselves to create a strong grass  
5 roots support system of Republican Candidates nationwide starting with  
6 the support of President George W. Bush and Vice President Dick Cheney.  
7 There will be a specially designed "Bush/Cheney '04" logo on the hood of  
8 the car for the Daytona race. The special Bush/Cheney logo will be on  
9 various places on the car at all 34 races.

10  
11 *See Staff Reports, Conz to Busch Series in 2004 (January 25, 2004) available at*  
12 <http://jayski.thatsracin.com/busch/archive/2004jan-bgn.htm>.

13 Before competing in the Hershey's race, drivers performed three practice runs and a  
14 qualifying trial to determine the 43 participants in the race. Brian Conz drove the "First Lady"  
15 car at all three practice runs. In the first two practice runs, which were broadcast live on the  
16 Speed Channel on February 12, 2004, from 9:30 a.m. to noon, Brian Conz placed 50<sup>th</sup> and 49<sup>th</sup>  
17 respectively.<sup>4</sup> Later that afternoon in the third practice run, also broadcast on the Speed Channel  
18 on February 12, 2004, Mr. Conz finished in 47<sup>th</sup> place. On Friday, February 13, 2004, the Speed  
19 Channel aired the qualifying trial live from 10:00 a.m. to 12:30 p.m. Brian Conz placed 47<sup>th</sup> in  
20 the qualifying trial, which was not sufficient to qualify for the race.

21 On April 9, 2004, CDC announced in a press release that it had suspended operations for  
22 60 days to reorganize, noting that the main reason for this move was the lack of sponsorship  
23 money. Mike Irwin, *NASCAR Busch Series*, Stock Car Gazette, April 13, 2004. CDC also  
24 announced in its press release that its 2002 Monte Carlo Superspeedway car was for sale. *Id.* On  
25 May 26, 2004, Brian Conz stated on his website, [www.brianconz.com](http://www.brianconz.com), that CDC, through the

---

<sup>4</sup> The Speed Channel is a cable television channel that focuses on the world of racing, including NASCAR races, events and original programming as well as other racing series, such as Formula One. *See Fox Entertainment Group Annual Report (2003).*

1 actions of his brother Butch Conz, had prevented him from competing in any NASCAR BGN  
2 races after the first NASCAR BGN race by taking possession of his cars and equipment. Brian  
3 Conz also alleged that his brother had planned to sell those items and keep the profits for his own  
4 personal gain. *See* Attachment 2. On November 29, 2004, in another message on his website,  
5 Brian Conz stated that he had not raced at all during the 2004 season, had sued his brother and  
6 CDC racing, and had turned over documents to the "proper authorities" who have begun  
7 investigating CDC's and his brother's business dealings and the finances of CDC. *See*  
8 Attachment 3.<sup>5</sup>

9 CDC apparently has not participated in any racing activity following its failed attempt to  
10 qualify for the first NASCAR BGN race. Race results posted on NASCAR.com show that CDC  
11 did not perform any practice runs or any qualifying time trials for any NASCAR BGN race after  
12 the Hershey's race. Likewise, the NASCAR Nextel Cup series and the ARCA Re/Max series do  
13 not record that any CDC team car attempted to qualify for any races in their respective leagues.

14 **C. CDC's Response to the Complaint**

15 On April 3, 2004, Edward ("Butch") Conz, Jr. responded to the complaint on behalf of  
16 CDC. According to Mr. Conz, CDC believed it had not violated any federal election laws  
17 because it "did not give away anything." Attaching a purported "letter of intent," Mr. Conz  
18 stated that "[t]he Michigan Republican Party owes us \$6,000,000, \$700,000 from Daytona and  
19 leading up to Daytona alone, which they have yet to pay one dime of." The attached document is  
20 an unsigned December 19, 2003 letter addressed to "potential investors/sponsors" from Victor  
21 Diaz, "6<sup>th</sup> Vice Chair, Michigan Republican State Committee," who is apparently the same Mr.

---

<sup>5</sup> We do not know which "authorities" Brian Conz is alluding to in his message.

25044110208

1 Diaz who co-owns CDC. *See* footnote 3, *supra*. The letter is drafted on what purports to be  
2 Michigan GOP<sup>6</sup> letterhead and states:

3 The Conz/Diaz Champion Racing Team has presented to us their  
4 business plan and racing budget for the 2004 season. We at the  
5 State Party find the prospect of a Republican led team competing  
6 in the fastest growing sport in the country quite an exciting endeavor.  
7 We have accepted the challenge and are working with our friends in  
8 the business community to raise \$6,000,000 by June 1, 2004 for their  
9 effort.

10  
11 It is our hope that if you receive this letter, within the context of a  
12 promotional packet for this team and that you give the request consideration [sic].  
13 We hope that you can develop a business relationship with this team, subject  
14 to your inspection of their materials, and the needs of your enterprise.

15 **III. DISCUSSION**

16 At this point, the only issues that appear resolved are that the display of the names "Bush"  
17 and "Cheney," and the numbers "04" on the hood of the "First Lady," constitutes a  
18 communication that falls within the definition of "expressly advocating," *see* 11 C.F.R.  
19 § 100.22(a), and that someone financed that communication. Beyond that, there are a host of  
20 unanswered factual and legal issues, including whether the purported "letter of intent" meets the  
21 standards for investigating whether the communication in issue was coordinated with the  
22 Michigan GOP.<sup>7</sup>

23  

---

<sup>6</sup> The Michigan GOP is registered as a political committee (Michigan Republican State Committee) that represents the Republican party and is part of the official party structure at the state level. *See* 11 C.F.R. § 100.5(e)(4).

<sup>7</sup> There is no suggestion of any coordinated activity involving the "Bush-Cheney '04" campaign. As noted by the complainant, public sources report that CDC's car was not officially sanctioned or funded by the Bush-Cheney re-election campaign. *See* Chris Jenkins, *NASCAR crowd jumps into 24-hour race*, USA Today, January 29, 2004. *See also* David Caraviello, *New Busch team has Charleston connection*, The Post and Courier Charleston.net, January 30, 2004.

25044110209

1           **A.     Possible Coordinated Communication**

2           Pursuant to the Bipartisan Campaign Reform Act of 2002 ("BCRA"), a communication is  
3 coordinated with a political party committee, or agent thereof, if it meets a three-pronged test:  
4 (1) payment by a third party; (2) satisfaction of one of the four "content" standards described in  
5 Section 109.21(c);<sup>8</sup> and (3) satisfaction of one of the six "conduct" standards described in  
6 Section 109.21(d). 11 C.F.R. § 109.21.

7                   **1.     Payment Standard**

8           In its response to the complaint, CDC maintains that it incurred \$700,000 in costs,  
9 leading up to and including the Hershey's race; it appears that CDC is contending that it paid  
10 those costs with the expectation of reimbursement from the Michigan GOP. Putting aside the  
11 issue of whether the cost of the communication was the full \$700,000 or a smaller sum, if the  
12 cost was borne by CDC, as it appears, or any other third party, the payment prong of the  
13 coordinated communication test is met. *See* 11 C.F.R. § 109.21(a)(1).

14                   **2.     Content Standard**

15           The "Bush-Cheney '04" logo on the "First Lady" car is a "public communication that  
16 expressly advocates the election or defeat of a clearly identified candidate for Federal office."  
17 11 C.F.R. § 109.21(c)(3). A "public communication" is defined as a communication by means of  
18 any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising  
19 facility, mass mailing or telephone bank to the general public, or any other form of general public

---

<sup>8</sup> In *Shays v. FEC*, 02-CV-1984, slip op. at 32-48, 156-57 (D.D.C. Sept. 18, 2004) (notice of appeal filed Sept. 28, 2004) the District Court invalidated the content standard of the coordinated communications regulation and remanded it to the Commission for further action consistent with the Court's opinion. In a subsequent ruling, the Court explained that the "deficient rules technically remain 'on the books,'" and did not enjoin enforcement of this (or any other) regulation pending promulgation of a new regulation. *Shays v. FEC*, 02-CV-1984, slip op. at 2 (D.D.C. Oct. 19, 2004).

25044110210

1 political advertising. 11 C.F.R. § 100.26. Given the wide variety of businesses that advertise on  
2 race cars in general and on stock cars in particular, and the apparent importance of stock car  
3 sponsorship as an advertising medium, a political message on a stock car, like the "First Lady"  
4 car's "Bush-Cheney '04" logo, would constitute an "other form of general public advertising,"  
5 and so would be within the definition of a "public communication." Thus, the content prong of  
6 the coordinated communications test is met.

### 7 3. Conduct Standard

8 With respect to the conduct prong, there is sufficient evidence to investigate whether one  
9 of the conduct standards were met. Communications that meet the conduct standards of Section  
10 109.21(d) include:

- 11 (1) communications made at the "request or suggestion" of the relevant candidate or  
12 committee;
- 13 (2) communications made with the "material involvement" of the relevant candidate or  
14 committee; and
- 15 (3) communications made after "substantial discussion" with the relevant candidate or  
16 committee.

17  
18 11 C.F.R. §§ 109.21(d)(1)-(3).

19 Here, an investigation of whether the Michigan GOP engaged in coordinated  
20 communications may be based on the "material involvement" conduct standard. The "material  
21 involvement" standard is satisfied if:

22 A candidate, an authorized committee, a political party committee, or an agent of any of  
23 the foregoing, is materially involved in decisions regarding:

- 24 (i) The content of the communication;
- 25 (ii) The intended audience for the communication;
- 26 (iii) The means or mode of the communication;
- 27 (iv) The specific media outlet used for the communication;
- 28 (v) The timing or frequency of the communication; or
- 29 (vi) The size or prominence of a printed communication, or duration of a  
30 communication by means of broadcast, cable or satellite.  
31

25044110211

1 11 C.F.R. § 109.21(d)(2).

2 The Commission has explained that, in order to be “materially involved” in decisions  
3 enumerated in Section 109.21(d)(2), the “representatives of [a] political party committee need  
4 not be present or included during [the] formal decisionmaking process but need only participate  
5 to the extent that he or she assists the ultimate decisionmaker, much like a lawyer who provides  
6 legal advice to a client is materially involved in a client’s decision even when the client  
7 ultimately makes the decision.” Explanation & Justification, “Coordinated and Independent  
8 Expenditures,” 68 Fed. R. 421, 434 (Jan. 3, 2003) (“E&J”). It is also notable that the “material  
9 involvement” standard describes conduct—in the disjunctive—by “[a] candidate, an authorized  
10 committee, a political party committee, or an agent of any of the foregoing.” *Id.* Accordingly,  
11 apart from the activity through an authorized agent, a “political party committee” may be  
12 materially involved in the activity by furnishing a decisionmaker for the spending organization  
13 with access to party information that is material to the spending organization’s advertising.<sup>9</sup>

14 In the present matter, the “material involvement” standard appears to be met because  
15 Victor Diaz simultaneously held leadership positions in both the Michigan GOP and CDC. As  
16 sixth Vice Chair of the Michigan GOP, Diaz may have had access to material information about  
17 the Michigan GOP’s plans, projects, or needs, and as a co-owner of CDC, Diaz was in a position  
18

---

<sup>9</sup> In its explanation of these rules, the Commission has repeated the disjunctive formulation of the persons at issue under the “material involvement” standard. “[A] candidate, authorized committee, or political party committee is considered ‘materially involved’ in the decisions enumerated in paragraph (d)(2) after sharing information about plans, projects, activities, or needs with the person making the communication, but only if this information is found to be material to any of the above-enumerated decisions related to the communication.” E&J at 434.

25044110212

1 to use that information to make decisions in connection with CDC communications.<sup>10</sup>

2 **B. Countervailing Factors**

3

4 As discussed above, absent countervailing factors, there is sufficient evidence to meet the  
5 reason to believe threshold for violations of making and receiving prohibited contributions and to  
6 warrant an investigation. However, there are pragmatic reasons for not going forward in this  
7 matter.

8 First, the public communication at issue appears to have been short-lived and of minimal  
9 significance. The car carrying the communication was entered in the Busch series, not the more  
10 widely followed Nextel series. It ran only in practice and qualifying runs for the Hershey's race,  
11 and failed to qualify for the actual race. Thus, putting aside some modest free publicity, the  
12 communication in issue likely was seen only by a small number of racing fans who showed up  
13 for the Busch practice and qualifying runs or who watched these runs on the relatively low-rated  
14 Speed Channel. This is in marked contrast to the airplane banner that flew over the packed  
15 grandstand of a Winston Cup series races in a previous enforcement matter. *See* MUR 3608  
16 (Bush-Quayle '92 General Committee, Inc.). Moreover, CDC apparently has entered no cars in  
17 other races since the Hershey's race.

18 Second, based on Brian Conz's website messages, it appears that there is a significant rift

19

---

<sup>10</sup> In addition to the "material involvement" conduct standard, the facts present a basis to investigate whether the "request or suggestion" or "substantial discussion" elements might also be satisfied. *See* 11 C.F.R. § 109.21(d)(1) and (3). The "substantial discussion" conduct prong covers communications produced "after one or more substantial discussions about the communication between the person paying for the communication [or that person's employees or agents]" and any from a list of persons including a political party committee or its agents. 11 C.F.R. § 109.21(d)(3). "A discussion is substantial within the meaning of this paragraph if information about the [party committee's] campaign plans, projects, activities or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication...." *Id.* As described in our analysis of the "material involvement" standard, Diaz's positions in both CDC and the Michigan GOP may have given him access to material inside information that he could have conveyed to his business partners at CDC.

25044110213

1 between the Conz brothers that has already reportedly spawned a lawsuit relating to CDC's  
2 finances and business dealings. *See* Attachments 2 and 3. The relationship between co-owners  
3 Conz and Diaz may also be acrimonious, given that Diaz is a Vice Chair of the Michigan GOP,  
4 the entity that Conz alleges in the response owes CDC \$6,000,000. Moreover, the continuing  
5 operating status of CDC appears to be in doubt. These circumstances may result in a protracted  
6 and difficult investigation, requiring a substantial use of Commission resources that are better  
7 reserved for more important matters.

8 Finally, the Michigan GOP has been implicated in this matter only because of the  
9 purported "letter of intent." The letter is not signed and there is no evidence it was sent, or that if  
10 it was, that it attracted any sponsors or investors. Moreover, the facts strongly hint that Diaz  
11 acted so much on his own that, in combination with the other countervailing factors, the exercise  
12 of prosecutorial discretion is warranted. The facts pointing to Diaz acting on his own include  
13 that the letter is under his name alone, CDC's rather extraordinary claim in its response that the  
14 Michigan GOP owes CDC \$6,000,000 as a result of the letter, Diaz's personal pecuniary interest  
15 in the racing venture, and the apparent lack of any awareness, much less consideration, of the  
16 FECA implications by anyone involved.

17 Based on the above, this Office recommends that the Commission exercise its  
18 prosecutorial discretion and take no action against Conz-Diaz Champion Racing and close the  
19 file.

20 **IV. RECOMMENDATIONS**

- 21 1. Take no action against Conz-Diaz Champion Racing with respect to the complaint in  
22 MUR 5420.
- 23 2. Close the file.

1           3. Approve the appropriate letters.

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Lawrence H. Norton  
General Counsel

Rhonda J. Vosdingh  
Associate General Counsel  
for Enforcement

12/23/04  
Date

BY:

Susan L. Lebeau  
Susan L. Lebeau  
Assistant General Counsel

Roy Q. Lockett / by STL  
Roy Q. Lockett  
Attorney

Attachment

1. Photographs of the "First Lady" Car
2. Message on www.brianconz.com
3. Message on www.brianconz.com

25044110215